THE CONSTITUTIONALITY OF THE EIGHT-HOUR RAILROAD LAW.

Section one of the Adamson Act[1] provides that "eight hours shall, in contracts for labor and service, be deemed a day's work and the measure or standard of a day's work for the purpose of reckoning the compensation for services of all employees who are now or may hereafter be employed by any common carrier by railroad (with a few minor exceptions) . . . and who are now or may hereafter be actually engaged in any capacity in the operation of trains" used in interstate commerce. The second section provides for the appointment of a commission of three "which shall observe the operation and effects of the institution of the eight-hour standard workday . . . during a period of not less than six nor more than nine months" and shall report its findings to the President and Congress. The third section forbids pending the report of this commission the reduction of the compensation of the employees' subject to the act below the present standard day's wage, "and for all necessary time in excess of eight hours such employees shall be paid at a rate not less than the pro rata rate for such standard eight-hour workday." The fourth and last section establishes penalties for the violation of any of the provisions of the law.

The constitutionality of this law involves two questions: First, is this type of legislation regulating the employment contract of master and servant in interstate commerce within the commerce power of Congress? Second, is this particular act a reasonable and constitutional exercise of that power?

The first question is easily answered. The power over interstate commerce is "vested in Congress as absolutely as it would be in a single government."[2] Congress has then over interstate commerce the same power that any state has over its intrastate commerce, and the Supreme Court has emphatically said: "We fail to perceive any just reason for holding that Congress is without power to regulate the relation of master and servant, to the extent that regulations adopted by Congress on that subject are solely confined to interstate commerce, and therefore are within the grant to regulate that commerce or within the authority given to use all

[1]64th Congress 1st Session. H. R. 17700, Passed September 1, 1916.

[2]Lottery Case (1903) 188 U. S. 321, 23 Sup. Ct. 321; Southern Ry. *v.* United States (1911) 222 U. S. 20, 32 Sup. Ct. 2.

means appropriate to the exercise of the powers conferred."[3] The Adamson Law is specifically limited to employees engaged in interstate commerce by words which have met the approval of the Supreme Court. It can therefore be safely said to be within this power of Congress. But though the power of Congress over interstate commerce is plenary, it is still subject to the limitations prescribed in the Constitution.[4] This brings us to the second question.

The Adamson Law seeks to regulate the employment of workmen in interstate commerce. It therefore restricts the right to purchase and sell labor which is a part of the "liberty" protected by the amendments to the federal constitution.[5] "Liberty implies the absence of arbitrary restraint, not immunity from reasonable regulations and prohibitions imposed in the interests of the community."[6] That is to say, the constitutional limitation is not that "no one shall be deprived of liberty", but that "no one shall be deprived of liberty without due process of law". This provision for due process of law has given rise to two lines of cases, those defining due process in legal procedure and those defining due process in legislative enactment. In considering the Eight-Hour Law, we will be concerned with only the second line of cases. Now, for a legislative enactment to be not without due process of law, it must abridge the liberty of the individual in the exercise of some legitimate function of government.[7] We may then consider the Adamson Law legal if passed in exercise of the police power of the federal government, of the power of the government over businesses affected with a public interest, or of the power of a state to amend the charters of the corporation which it creates. If the act can be sustained under any of these governmental functions, it is not a deprivation of liberty without due process of law. If it does not fall within any of these classes, the law is unconstitutional.

The police power of the federal government extends, as has

[3]First Employers' Liability Cases (1908) 207 U. S. 463 at 495, 28 Sup. Ct. 141.

[4]Gibbons *v.* Ogden (1824) 22 U. S. 1.

[5]This law, being a federal enactment, is subject to the Fifth Amendment, but because of the similarity of the two, the Fourteenth and Fifth Amendments will be cited indiscriminately. Lochner *v.* New York (1905) 198 U. S. 45, 25 Sup. Ct. 539; Muller *v.* Oregon (1908) 208 U. S. 412, 28 Sup. Ct. 324; Riley *v.* Massachusetts (1914) 232 U. S. 671, 34 Sup. Ct. 469.

[6]Crowley *v.* Christensen (1890) 137 U. S. 86, 11 Sup. Ct. 13; Jacobson *v.* Massachusetts (1905) 197 U. S. 11, 25 Sup. Ct. 358; C. B. & Q. R. R. *v.* McGuire (1911) 219 U. S. 549 at 567, 31 Sup. Ct. 259.

[7]C. B. & Q. R. R. *v.* McGuire (1911) 219 U. S. 549, 31 Sup. Ct. 259.

been said to the same limits as does the police power of a state over its domestic affairs. It is in pursuance of this power that most social legislation has been enacted and, in the enactment of this legislation, this power has awakened from the comparative quiescence of a mere order-keeping function of the government into an omnipresent corrective of social ills. It is well recognized now that this police power extends to the protection of health, safety, morals, and general welfare,[8] and some decisions even say to the furtherance of the public convenience.[9] The Adamson Eight-Hour Law is a species of social legislation, and, though a new type, may possibly be justified under this power.

Calling the law an eight-hour law suggests the first line of reasoning which any attempt to uphold it will take. Since the decision of *Holden* v. *Hardy*[10] in 1898, it has been well recognized that the regulation of hours of labor is a legitimate field for legislative activity. Since then, most of the laws passed have been in regulation of the hours of labor of women and children, and it has been finally held that it is within the police power of the State to limit the hours of labor of women to eight hours in all occupations.[11] On similar grounds—for the more delicate structure of women was not stressed as a special ground for the legislative protection in the later case as it was in *Muller* v. *Oregon*[12]—it might well be held that the legislature acting upon ascertained facts, could limit the hours of labor of men in all occupations. But this is debatable ground and it is not necessary to go so far in upholding an eight-hour law for railroad employees. For the hours of labor of men engaged in dangerous occupations[13] or in occupations detrimental to the health of the employees[14] are subject to the regulation of the state. Congress had eight years ago passed a law limiting the hours of labor of certain railroad employees to nine and of all railroad employees to sixteen consecutive hours in one day and, in upholding this law,[15] the Supreme Court, per

[8]See *e. g.* Lochner *v.* New York (1905) 198 U. S. 45, 25 Sup. Ct. 539; Muller *v.* Oregon (1908) 208 U. S. 412, 28 Sup. Ct. 324.

[9]See *e. g.* C. B. & Q. R. R. *v.* Drainage Comrs. (1906) 200 U. S. 561, 26 Sup. Ct. 341; Eubank *v.* City of Richmond (1912) 226 U. S. 137, 33 Sup. Ct. 76.

[10](1898) 169 U. S. 366, 18 Sup. Ct. 383.

[11]Miller *v.* Wilson (1915) 236 U. S. 373, 35 Sup. Ct. 342.

[12](1908) 208 U. S. 412, 28 Sup. Ct. 324.

[13]Holden *v.* Hardy (1898) 169 U. S. 366, 18 Sup. Ct. 383.

[14]Lochner *v.* New York (1905) 198 U. S. 45, 25 Sup. Ct. 539.

[15]Act of Congress March 4, 1907 Ch. 2939, 34 Stat. 1415.

Hughes, J., said: "By virtue of its power to regulate interstate and foreign commerce, Congress may enact laws for the safeguarding of persons and property that are transported in that commerce and of those who are employed in transporting them. . . . Congress was not limited to the enactment of laws relating to mechanical appliances, but it was also competent to consider, and to endeavor to reduce, the dangers incident to the strain of excessive hours of duty on the part of engineers, conductors, train dispatchers, telegraphers," etc.[16] That the Adamson Law limits the hours of labor to eight is no argument against its constitutionality, for the legislature is in the first instance the judge of what is necessary for the public welfare, and, granting that the enactment is within its power, the wisdom and the soundness of the economic theory of the laws are matters for the judgment of the legislature only.[17]

The Adamson Law cannot, however, be upheld under this power of the state to regulate hours of labor. If Congress had enacted that eight hours should be a lawful day's work for employees on railroads and that, except in cases of emergency, no employee should work more than eight hours in any one day, the cases just cited would prevent the Supreme Court from exercising its veto upon that law. But the Adamson Law does not do this. It establishes a legal eight-hour working day but does not prohibit the employees from working more than eight hours a day. This takes it entirely out of the class of laws which have been upheld in any cases. These laws were upheld as health measures upon the ground that excessive hours are a strain upon the health of the worker and indirectly a menace to the welfare of the community. If the Adamson Law does not prohibit excessive hours, it can hardly be called a health measure; it can hardly be called an hours of labor law at all for it does not in any way limit the hours of labor. The argument that, in thus establishing a legal day's work and requiring payment for overtime, the law will tend to establish the legal day's work as the maximum day's work and in effect limit the hours of work, in the light of the discussion which preceded the passage of the act must be decided against the realization of this tendency. This, however, is a question of fact and when the law is tested before a court, its advocates may be able to prove

[16]B. & O. R. R. *v.* Int. Com. Com. (1911) 221 U. S. 612, at 618, 31 Sup. Ct. 621.

[17]C. B. & Q. R. R. *v.* McGuire (1911) 219 U. S. 549, 31 Sup. Ct. 259; Erie R. R. *v.* Williams (1914) 233 U. S. 685, 34 Sup. Ct. 761.

that its final effect will be to limit the hours of labor. If so, no doubt the law is constitutional. Until this fact is demonstrated, we must consider the law as establishing a legal day's work only for the purpose of reckoning compensation.

The attempt to uphold the law as an exercise of the police power in regulating wages will result less successfully than that to uphold it as regulating the hours of employment. Indeed the police power has been made little use of in the regulation of wages. Laws requiring the payment of wages every fortnight and in current money have been upheld as measures to prevent fraud.[18] Laws regulating the rate of wages paid by contractors for public work have been passed in exercise of the power to control the expenditures from the public purse. Laws, somewhat like the Adamson bill, establishing a legal day for the purpose of reckoning compensation except when the employer and employee contract otherwise have been enacted rather as laws establishing a rule of evidence than as labor laws. But in analogy to none of these can the Adamson Law be sustained. It establishes a legal day for the purpose of reckoning compensation in all cases and, by the third section forbidding any reduction of wages from the present standard day's wage, it practically attempts to fix the wages of railroad employees absolutely. The nearest approaches to this in previous legislation are the various laws establishing a minimum wage for women. These laws have not yet been passed upon by the Supreme Court; but, if they are upheld, it will be upon the grounds presented in the brief filed by Mr. Brandeis and Miss Goldmark in the minimum wage cases.[19] This brief argues that as low wages are detrimental to the health, morals, and economic welfare of the women, it is to the interest of the community that the women be paid a fair living wage. No such argument can be made in favor of the Adamson Law, for as will be shown later the wages received by the trainmen are well above the economic minimum wage. It cannot therefore be argued that this law establishes a minimum necessary to the health, morals, and economic welfare of railroad employees. Granting, then, for the purpose of argument, that the grounds set forth in the brief will be accepted by the Supreme Court, it yet cannot be argued that the Court in thus extending the police power beyond anything which it has up to now sanctioned will establish any precedent upon which the

[18]Knoxville Iron Co. *v.* Harbison (1901) 183 U. S. 13, 22 Sup. Ct. 1.

[19]Stetler *v.* O'Hara (1914) U. S. Sup. Ct. Oct. Term 507, 508.

Adamson Law can be sustained as an exercise of the police power to regulate wages.

Finally, in view of the occasion of the Adamson Law, it is necessary to examine it as an exercise of the police power for the prevention of strikes. As was said by McKenna, J., in his dissenting opinion in *Adair* v. *United States*[20]—and the opinion of the Court contains nothing contrary to this: "I submit no worthier purpose can engage legislative attention or be the object of legislative action, and it might be urged, to attain which the congressional judgment of means should not be brought under a rigid limitation and condemned, if it contribute in any degree to the end" of preventing strikes and the concomitant disorganization of business. But in spite of this prima facie constitutionality of the legislative enactment, the law must be as has been so often iterated a reasonable means to accomplish the end.[21] The law as to what is a reasonable means to prevent strikes is decidedly meagre. The only Supreme Court case—and the only case I have been able to find—is that of *Adair* v. *United States,* in which it was held that a provision in the general arbitration law which prohibited the arbitrary discharge of a railroad employeè because of his membership in a labor union had no reasonable relation to the prevention of strikes. This furnishes us with no analogy as to the Adamson Law; but again an examination of the provisions of this law will lead to a conclusion against rather than for the constitutionality of the law. True, the section ordering the President to appoint an investigating commission does give the act the air of being a legitimate means to prevent a strike and the court might hold that the fixing of wages for six or nine months is a reasonable experiment to ascertain a basis for a lasting industrial peace. But, on the other hand, the *a priori* determination of an industrial question absolutely without investigation smacks too much of arbitrary discrimination. It is too much in the nature of a question judicial in its nature being decided by capricious legislation. If every strike were to be decided by the legislature, too many political questions would enter into the determination of the result to allow it to be impartial and just. Then, though the Adamson Law were expedient and necessary at the time of its passage, this method of settling disputes con-

[20](1908) 208 U. S. 161 at 184, 28 Sup. Ct. 277.

[21]C. B. & Q. R. R. *v.* McGuire (1911) 219 U. S. 549, 31 Sup. Ct. 259

flicts too forcibly with our sense of justice to be considered a reasonable means to secure industrial peace.

It seems, therefore, that the police power presents little basis upon which to sustain the constitutionality of the law. A very liberal interpretation might bring it under the power to limit the hours of labor or to prevent strikes, but this probability is not so great as to stop us from looking further for some more potent arguments. Accordingly, we shall next examine the power of a state over businesses tinged with a public interest.

This power of the government over these quasi public businesses is more extensive than the general police power of the government, but this power too is subject to limitations.[22] If the reasons for this power are understood, its extent and the nature of the limitations upon it will be obvious. These public utilities, as these businesses are called, supply the public with the most necessary commodities, transportation, light and heat, water, grain-storage, and the like. Moreover, "so far as one can see virtual competition is at an end in these industries and virtual monopoly will henceforth prevail. Therefore it must be said that the public has now an interest in the conduct of these businesses by their owners."[23] And this interest of the public demands the regulation of these businesses in just those respects in which the lack of competition is likely to result in the public's injury. As the Supreme Court has so often said: "they are subject to legislative control in all respects necessary to protect the public against danger, injustice, and oppression."[24] It is therefore evident that the right to regulate the transportation by common carriers—and the Adamson Law is a regulation of common carriers—"extends to every phase of the service and to every act of the carrier that affects the service."[25] If all the enactments of Congress regulating interstate railroads are examined, they will be seen to be all in relation to the service of these carriers, either to procure a cheaper or a more efficient service. The Adamson Law is the first attempt to make the service more efficient by increasing the wages of the employees—for we can now frankly consider the law as regulating wages—but this novelty does not condemn it.

[22]Railroad Commission Cases (1886) 116 U. S. 307, 6 Sup. Ct. 334; see 1 Thompson, Corporations (2nd ed.) §§ 441-448.

[23]1 Wyman, Public Service Corporations § 36.

[24]N. Y. etc. R. R. *v.* Bristol (1894) 151 U. S. 556 at 571, 14 Sup. Ct. 437.

[25]State *v.* Atlantic Coast Line R. R. (1911) 60 Fla. 465, 54 So. 394; Sinking Fund Cases (1878) 99 U. S. 700.

It is, however, again necessary to examine whether the means are a reasonable attempt to attain the end.

Higher wages, it is argued by the economists, conduce to greater efficiency in two directions: they stimulate the employer and they make the employee capable of greater exertions. Considering first the effect of higher wages upon the employee, we must all concede that the well-paid, well-nourished workman is a superior machine to the underpaid, undernourished worker. No one nowadays argues that sweated labor is efficient labor or even cheap labor. If then the Adamson Law was an enactment to guarantee to the trainmen a "fair living wage" for less than which they would not be able to render efficient service in the handling of trains, it would clearly be a reasonable measure to procure efficient service. But the trainmen receive wages well above a fair living wage. Taking the estimate of John Mitchell, president of the United Mine Workers of America, of six hundred dollars as a fair living wage or that of the Massachusetts Commission to Investigate the Cost of Living (1910) of seven hundred and sixty odd dollars, the wages of the trainmen will be found to be far above this standard, for according to figures furnished by the Pennsylvania Railroad, the average wages of its employees are as follows:

	Passenger Service	Freight Service	Yard Service
Engineers	$1843	$1601	$1454
Conductors	1713	1357	1261
Firemen	1066	936	877
Brakemen	986	872	1028

Some economists apparently do not stop with the argument that well-paid workmen are more efficient than underpaid workmen but argue generally that the higher wages a worker is paid, the more efficient he will be.[26] However, though we may agree with these economists as to workers slightly above the margin, it is hard to believe that an increase of ten per cent. in wages of a man who earns from twelve to eighteen hundred dollars will increase his efficiency in any way. Certainly a court could hardly sustain legislation upon such sublimated hypotheses.

The second part of the argument that higher wages cause greater efficiency because of the stimulus to the employer is based

[26] See Seligman, Principles of Economics pp. 288-293; Shadwell, A Comparative Study of Industrial Life in England, Germany and America, Vol. II, pp. 125-130; Carlyle, Wages pp. 29, 75; Adam Smith, Wealth of Nations.

upon that characteristic of human nature to "get one's money's worth". As one eminent authority puts it: "For the increased wages they (the employers) paid, they saw to it that they got more efficient work. Thus the labor was not more expensive to the employer, although the workers received more."[27] Added to this increased efficiency in the handling of the business, there is ample authority to prove that increased wages are an incentive to invention which usually results in more efficient and cheaper production.[28] All in all, this seems to be the best line of argument upon which to uphold the Adamson Law. The Supreme Court, if it follows the argument, will sustain a law upon more problematical grounds based upon less investigation than it usually does; but if logical arguments are presented that this initial increase in wages will result in a more efficient management of the railroads, in a more efficient and expeditious movement of freight, in the invention of better means of transportation, in short, if it can be shown that this initial increase of wages will result in the public's benefit either in cheaper or in more efficient services, the *prima facie* justifiability of legislative action might enable the Court to sustain the law in spite of the hypotheses upon which the argument will be based.

The last power under which a legislative infringement upon the liberty of a citizen may be according to due process of law, the power of a state to amend the charter of a corporation which it has created, will contribute little to upholding the Adamson Law. It will be briefly considered here rather to make this a well-rounded treatment than in the hope of solving the problem. The Adamson Law could of course operate as an amendment of the charters of only the few federal corporations, such as the Union Pacific Railroad, which have been created by Congress; and, since we are treating of the federal power to amend, it will not be necessary to observe whether the charters reserve the right to amend, for the provision in the federal constitution forbidding the impairment of the obligation of contracts does not apply to the federal government.[29] The power to amend confers upon

[27]Sidney Webb in testifying before the National Conference on the Prevention of Destitution (English). Section—Unemployment and Industrial Regulation p. 425.

[28]Sir Thomas Brassey, Work and Wages pp. 13, 74-76; Report from Select Committee on Home Work to House of Commons p. XIV; Report of Chief Inspector of Factories of Victoria (1897) p. 9; also (1901); Adam Smith, Wealth of Nations.

[29]Legal Tender Cases (1872) 79 U. S. 457.

the legislature the power to make any alteration or amendment of a charter subject to it, which will not defeat or substantially impair the object of the grant, or any right vested under the grant, and which the legislature may deem necessary to carry into effect the purpose of the grant, or to protect the rights of the public or of the corporation, its stockholders or creditors, or to promote the due administration of its affairs.[30] So far as legislative enactments do not regulate the methods of the corporation or the relation of the corporation to the state but interfere with purely private matters, such as the employment of labor, as the Adamson Law does, the requirement of the law is that it must be for the benefit of the public.[31] In other words, the same limitations which restricted the police power apply here. It is unnecessary therefore to examine further into the power; we may dismiss it with the statement that it carries us no further than the police power and accordingly furnishes no new grounds for sustaining the Adamson Law.

It seems then that the question of the constitutionality of the Adamson Law should be decided against its validity. We have examined the various functions of the government in exercise of which the law might have been passed but none of them furnishes a sound basis for the legislation. It has been seen that by following finely spun hypotheses, the courts might be able to sustain the law either as an exercise of the police power to regulate hours of labor or perhaps to avert strikes, or as an enercise of the power to regulate public service businesses in furtherance of the efficiency and cheapness of the service, but the subtle speciousness of these arguments is only too apparent. Still, it is possible that the courts, if convinced of the expediency of the law, will uphold it on any of these grounds. But the conclusions of this paper must fail to find any ground upon which they sustain the constitutionality of the law. In addition to this method of proving the unconstitutionality, there is also a positive argument against the law.

The Adamson Law is a social labor law. This type of law is the result of changes in industry brought about by the Industrial Revolution. This period of astoundingly rapid development of mechanical devices in production caused a profound change in

[30]Looker *v.* Maynard (1900) 179 U. S. 46, 21 Sup. Ct. 21.

[31]See 1 Thompson, Corporations §§ 401-415; Sinking Fund Cases (1878) 99 U. S. 700.

the relation of master and servant. Prior to the Industrial Revolution, the business unit had been composed of an employer with two or three employees; after it, with the advent of the factory, one employer employed hundreds and thousands of employees. This resulted in an inequality in the power of bargaining of the two parties to the labor contract. Legislatures recognized the fact "that the proprietors of these establishments and their operatives do not stand upon an equality, and that their interests are, to a certain extent, conflicting. The proprietors lay down the rules and the laborers are practically constrained to obey them. In such cases self-interest is often an unsafe guide, and the legislature may properly interpose its authority. . . . The fact that both parties are of full age and competent to contract does not necessarily deprive the state of the power to interfere where the parties do not stand upon an equality, or where the public health demands that one party to the contract shall be protected against himself."[32] In recognition of this inequality, the legislatures have passed laws guaranteeing to the laborer certain terms of the wage contract. They have guaranteed safe and sanitary places of work, limited hours of work, means and time of payment of wages, sure compensation for industrial accidents, and the courts when these laws have been upheld by them have explicitly or implicitly recognized that they were passed to remedy this inequality. But it cannot be claimed that the Adamson Law was enacted with any such end in view. The railroad employees whom this law affects are organized into the strongest labor unions in the United States. Their labor unions are the employee's answer to the factory system. Comprising, as they do, almost a monopoly of the workmen in this trade, they are able to employ experts to bargain for all their members with the railroad companies which have a monopoly of the jobs. By means of this organization and this collective bargaining, as it is called, the two parties to the labor contract are made equally strong. They are able by higgling and bargaining to settle upon an economically fair labor contract. Congress by the Adamson Law interfered in this bargaining in favor not of the weaker party but in favor of one of two equally competent parties. The law is absolutely without precedent.

MALCOLM H. LAUCHHEIMER.

BALTIMORE, MARYLAND.

[32] Holden *v.* Hardy (1898) 169 U. S. 366 at 397, 18 Sup. Ct. 383.